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THE LAW AS TO MARRIED WOMEN IN MISSOURI.

At common law a *feme* covert was not liable on her note, nor was there any means furnished to enforce her obligations personally. Although she might be possessed of an ample estate, and have received the money of others, still they were powerless to coerce payment. To prevent the great injustice which was liable to happen in such cases, as the wife's creditors had not the means of compelling the payment of her debts out of her separate estate by any mere legal process, the equity courts undertook at an early day to interpose a remedy, not by giving a personal judgment against the wife, but by laying hold of her separate property, to give the necessary and adequate satisfaction. In some of the American States the absolute and unqualified doctrine that prevails in the English equity courts, has been restricted and modified, and they hold that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income to the extent to which the power of disposal of the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it. But this doctrine has not obtained a foothold in Missouri. Here, at an early day, it was held that where a *feme covert* gives a note or bond, it is presumed that she intends to charge her separate property.

The earliest case was Coats v. Robinson.[1] The facts were that in 1843, Johnson sold his farm to Mrs. Coats for $1,250, and took a note signed by her and her husband and one Callaway, for the amount, payable in twelve months. There was a title bond made to Mrs. Coats, conditioned to make her a deed when the purchase money should be paid. Previous to the marriage of Mrs. Coats to her husband, a marriage contract had been made between them, by which she reserved to herself the exclusive management of her separate property. The bill filed was to obtain payment out of the separate estate of Mrs. Coats, the other payors in the note being insolvent. The court decided that complainant was entitled to a decree against the separate property of Mrs. Coats, remarking: "It is well established by a current of decisions, both in England and this country, that a *feme covert*, with respect to her separate property, is regarded in a court of equity as a *feme sole*, and that when she enters into agreements which indicate her intention to bind her separate property, such agreements will be effectuated by the court, unless they are characterized by fraud or some unfair advantage. * * * * Where the *feme covert* executes a bond or a note, or accepts a bill, it is held that she must intend by such instrument to bind her separate estate, because these acts would otherwise be nugatory, and these instruments could in no other way have any validity or operation." This, however, was the opinion of a divided court, Scott, J., dissenting.

But the question again arose in Whitesides v. Cannon,[2] where the cases were elaborately reviewed, and the doctrine announced in Coates v. Robinson was affirmed. In this case, Leonard J. delivered the opinion of the court, and Ryland, J., concurred with him. Scott, J., who had previously dissented, does not appear from the report to have taken any part in the decision. The case decides that where a married woman executes a promissory note jointly with her husband, although it does not appear on what account the note was executed, whether for the benefit of the wife, or of the husband, or for their joint benefit, equity will subject the real estate held to the separate use of the wife to the payment of the debt, and decree a sale of the same.

In Claflin v. Van Wagoner,[3] Coates v. Robinson, and Whitesides v. Cannon were re-af-

[1] 10 Mo. 757.

[2] 23 Mo. 457.

[3] 32 Mo. 252.

firmed, and for the first time the court was unanimous. There property had been conveyed to Krum, as trustee, to the sole use of Mrs. Van Wagoner, "and to such uses and purposes, and in such manner as she might, in writing, appoint." Subsequently Mrs. Van Wagoner became the indorser of a negotiable promissory note, and it was decided that such indorsement was practically an appointment in writing, and that she thereby charged her separate estate; and it was further held that the trustee was a proper party defendant, so that in case of sale the legal title might be conveyed.

In Kimm v. Weippert[4] the authorities, both English and American were extensively reviewed, and some dissatisfaction was expressed with the rule. It was said that "in the majority of cases the property is given to her to protect her weakness against the husband's power, and her maintenance against his dissipation. But if the mere fact of her signing a promissory note, not for her own benefit, is to be held an appropriation or a ground for subjecting her estate to payment, the protection is an illusion." The rule was however regarded as too firmly established and too inveterate to be interfered with by the courts, without disturbing property interests vested on the strength of the prior decisions, and therefore the doctrine as it previously existed was adhered to. This case further examined into the mode and manner of disposition of a married woman's property, and held that a *feme covert* is absolutely a *feme sole* with respect to her separate estate when she is not specially restrained by the instrument under which she acts to some particular mode of disposition; that the *jus disponendi* was incident to her separate estate, and followed it by implication, and that although a particular mode of disposition was pointed out, it would not preclude her from adopting any other mode of disposition unless there were words in the instrument of settlement conveying the estate restricting her to a certain prescribed and specific manner. It was further adjudged that the intent with which she signed the note or created the obligation must be gathered or interpreted from the contract itself, and not from extraneous evidence. In other words, parol evidence would not be allowed to either prove or disprove her intention as to charging her separate estate, but that like all other contracts the writing must speak for itself.[5] But the simple fact that a married woman's trustee creates debts for improvements ordered by him on her property, does not of itself create a lien on the property without any deed or other appropriate instrument of writing executed by him.[6]

A separate estate may be vested in an infant female as well as in an adult. Thus where by any instrument or proceeding property is conveyed to a trustee, for the sole, separate and exclusive use, benefit and behoof of certain parties, some of whom were infants and unmarried females, such instrument or proceeding creates a separate estate in such females, free from the control of any future husband. And if one of such females after she marries, joins with her husband in executing a promissory note, the law will presume that she intended thereby to charge her separate estate, and it will be liable[7]

The doctrine of Claflin v. Van Wagoner, again comes before the court in Siemers v. Kleeburg.[8] It was there held that in a suit to foreclose a mortgage and for general relief, in a proceeding against the separate estate of a married woman, her trustee should be joined as a party.

Where in a conveyance of land made in trust for the separate use and benefit of a married woman, she is authorized by any written order to direct a conveyance or mortgage, such written instrument passes her title without any examination separate and apart from her husband. Her written authorization to her trustee to make a conveyance or mortgage is effective to divest her title without any acknowledgment.[9]

In Burnley v. Thomas,[10] it was decided that no technical words were necessary to create a separate estate in a married woman, but that any words which evinced a clear intent or unequivocally imported that the mari-

[4] 46 Mo. 532.

[5] See, also, as to this last point, Metropolitan Bank v. Taylor, 62 Mo. 338.

[6] Druhe v. DeLassus, 51 Mo. 165.

[7] Metropolitan Bank v. Taylor, 53 Mo. 444.

[8] 56 Mo. 106.

[9] Thorpe v. McPike. 62 Mo. 300.

[10] 63 Mo. 390.

tal rights of the husband should not attach, would be sufficient. It was also held that a separate estate might be vested in a married woman for life only, and conjointly with her children. So too in Morrison v. Thistle,[11] it is declared that technical words or a particular form of phraseology are unnecessary to create a separate estate; that it is sufficient if from the words employed the intention to create such an estate be unquestionably evident. This case also holds that a married woman may bind her separate estate by a note executed in blank, and where the note is made payable to her husband, if it is in the hands of a third party, it may be enforced as a charge against her separate estate.[12]

From these decisions the conclusions follow: First. That if a married woman having a separate estate signs a note or executes a contract, the law presumes that she intended thereby to charge her separate estate, and it will be made liable accordingly; and this, too, without regard to whether the consideration inured to her personally or not. Second. That the intention must be collected from the instrument itself, or the nature of the contract, and can not be established or disproved by parol evidence. Third. That no form of words or peculiar phraseology is necessary to create a separate estate; but that anything that shows clearly that the marital rights of the husband were excluded, and that the estate was intended to vest solely and exclusively in the wife, will be sufficient. Fourth. That the *feme covert* being treated as a *feme sole* in reference to her separate estate, she may contract in regard thereto absolutely free, and sign a note in blank and be responsible the same as any person not laboring under any disability.

DOES THE INFRINGEMENT OF THE TERMS OF A PATENT CONSTITUTE ONE CAUSE OF ACTION?

This question was suggested by a motion to number the causes of action in a petition for the infringement of the original and extended terms of a patent, in accordance with the requirments of a State code. By force of sec. 914, U. S. Revised Statutes, the pleadings, etc., of the United States courts, conforming to those (Pomeroy's Remedies and Remedial Rights, sec. 575) of the State courts, and the State code providing that the causes of action in a petition should be separately numbered, it was insisted that as the petition alleged an infringement of both the original and extended terms of the patent, as constituting two causes of action, they should be separately stated. The objection, though technical, becomes material, when it is sought to apply the statute of limitations to an expired patent. If the original and extended terms of a patent are regarded as distinct, they should of course be separately numbered and as far as the statute of limitations is concerned, it would operate upon each term of the patent singly. The question then is whether the two terms of the patent are distinct or united in law?

The language of sec. 559 of the Consolidated Patent Act of July 8, 1870, would perhaps imply the latter view. "All actions," it provides, "shall be brought during the term for which the letters patent shall be granted or extended or within six years after the expiration thereof." This provision was omitted from the Revised Statutes and by the operation of sec. 5596, was therefore repealed as to all rights of action thereafter to accrue, but by virtue of sec. 5599 was left in full force as to all *choses* in existence at the date of the repeal. It seems pretty clear that the question whether the infringement of the original and extended terms of a patent constitute one cause of action depends upon the construction of the statute referred to.

It is well settled that a reiteration of infringements of the same patent may be sued for in one action. Wilder v. McCormick, 2 Blatchf. 31. But it is said there are two causes of action because there are two terms alleged to have been infringed, and just as in declaring on the covenants of a deed under the common law, there must be a count for each covenant broken, so there must be a separate count for each term infringed, or a separate cause of action under the code. And this would be true whether the action lay in contract, as in the first, or in tort, as in the second instance. Does the limitation clause apply to each of these terms singly or to both of them as taken together? If it applies to both of them as taken together, then the conclusion is, that they virtually constitute in law but one term, and therefore their infringement would constitute but one cause of action. It is urged that the true construction of the statute is shown by the substitution of the phrase, "term of the monopoly," for the expression, "term for which the letters patent shall be granted or extended," making it read, "all actions shall be brought during the term of the monopoly, or within six years after the expiration thereof," and this appears to be a reasonable construction of the clause referred to. It is certainly in accord with the language of sec. 18 of the Act of 1836, which first provided for the extension of patents, that "thereupon the said patent shall have the same effect as though it had been originally granted for

[11] 67 Mo. 596.

[12] See further on the subject Lincoln v. Rowe, 51 Mo. 571; Myers v. Van Wagoner, 56 Id. 115; DeBonn v. Van Wagoner, Id. 347.

the period of twenty-one years," (referring to the fourteen years of the first and the seven of the extended term of a patent) and with secs. 63–66 of the Act of 1870, when it was provided that any patent which had been granted prior to the passage of the Act of 1861, might under certain circumstances, be extended for seven years, and that "thereupon the said patent shall have the same effect in law, as though it had been originally granted for twenty-one years."

From the language of these statutes it may be gathered that the intention was to consider the two terms as one whenever the patent might be so extended as to include the fourteen years of the first and the seven years of the extended term as one whole undivided term of twenty one years. The statute of limitations would thus operate upon the latter period, giving to the patentee twenty-seven years in which to bring his action for infringement instead of twenty years as would be the case, did the statute operate upon the first term of fourteen years singly. It is of course taken for granted that the limitation is six years and not governed by any State statute. 8 Cent. L. J. 491.

Upon this question of construction the authorities are, however, as yet unsettled. In one case, Sayles v. Dubuque & Sioux City R. Co., (Oct. 1877), the court, Judges Dillon and Love, said that they considered the statute was ambiguous, and reserved their opinion for a final hearing. Another court (Sept. 1878, Mr. Justice Harlan), said upon the same question: "As I read this act, its meaning seems clear and satisfactory to my mind. I think the statute means that when a complainant sues for infringement under the original term, he must bring his action within six years after its expiration, and when he sues for infringement under the extended term, he must bring his action within six years after the expiration of that term." Another court, Sayles v. Richmond etc. R. Co., 8 Cent. L. J., 445, 4 Weekly Cin. Law Bull. 313, renders the following opinion: "I have given all the attention of which I am capable to the ingenious argument of defendants counsel in their contention that in spite of this language the limitation applied severally: first to the fourteen years, barring all claims accruing specifically in that period, and second, to the seven years, barring claims accruing afterwards in that period. So that if a suit is brought, as this was, within six years after the close of the later period it would be good to cover claims accruing therein, but would not be good to cover claims which had accrued anterior thereto. But it is too plain for doubt in my mind that the law, which is certainly written as has been quoted, really means what it declares when it provides that the renewed patent 'shall have the same effect in law as though it had been originally granted for twenty one years.' The necessary effect of this language is to consolidate the seven and fourteen years of the two patents into one term, as under one patent, and to make the limitation apply to the period of twenty-one years as a single integral term. Indeed I can well imagine it to have been one of the objects of sec. 66 of the Act of 1870, to establish a plain intelligible period of limitation, to-wit: Six years after one single interval period of twenty-one years, rather than to exact a complicated statute of limitations, depending upon two periods of limitations, two sets of dates and two classes of claims."

ELECTIONS — REGISTRY LAW UNCONSTITUTIONAL.

DELLS v. KENNEDY.

Supreme Court of Wisconsin, June, 1880.

A statute which, without regard to its possibility or impossibility in any case, requires as a prerequisite to the exercise of the right to vote, the previous registration of the elector, is unconstitutional.

Appeal from Milwaukee County.

Howard Morris and *Samuel Howard*, for appellant; *L. S. Dixon*, for respondents.

ORTON, J., delivered the opinion of the court:

This action is brought against the defendants for refusing, as the inspectors of election of the first precinct of the fifth ward of the City of Milwaukee, the vote of the plaintiff offered at the general election of 1879. The complaint shows that the plaintiff had all of the qualifications of a legal voter at such election and in such precinct, required by art. 3, sec. 1 of the Constitution of the State, and the general election laws, but fails to state that he had complied with the provisions of chapter 235 of the laws of 1879, requiring his previous registration to entitle him to vote, or that he was within the exception mentioned in the eighth section of said act. This act requires, as a prerequisite to the exercise of the constitutional right to vote at any general election named in the act, the previous registration of the elector, unless he becomes a qualified voter after the last day for completing the registry and before the election. The demurrer to the complaint was sustained by the circuit court on the ground that the plaintiff had not become a registered voter as required by said act, and was not within said exception. Section eight of the act absolutely prohibits any elector from voting at such election unless so registered or within such exception, and the only question, therefore, for the consideration of this court on this appeal is of the validity of said act. A few plain and unquestionable propositions will sufficiently present the views of this court upon the question of the constitutionality of this act.

The elector possessing the qualifications prescribed by the Constitution, is invested with the constitutional right to vote at any election in this State. These qualifications are explicit, exclusive and unqualified by any exceptions, provisos or conditions, and the Constitution, either directly or by implication, confers no authority upon the

legislature to change, impair, add to or abridge them in any respect. In the language of the chief justice, in Page v. Allen, 58 Pa. St. 346, "These are the constitutional qualifications necessary to be an elector. They are defined, fixed and enumerated in that instrument. In those who possess them, is vested a high, and to a freeman, sacred right, of which they can not be divested by any but the power which establishes them, viz.: The people in their direct legislative capacity. This will not be disputed. For the orderly exercise of the right resulting from these qualifications, it is admitted that the Legislature must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure its full and free exercise. But this duty and right inherently imply, that such regulations are to be subordinate to the enjoyment of the right, the exercise of which was regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself, might be invaded, frittered away or entirely exscinded, under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory. To state, is to prove this position. As a corrolary of this, no constitutional qualification of an elector can in the least be abridged, added to or altered by legislation or the pretense of legislation. Any such action would be necessarily absolutely void and of no effect." The learned counsel of the respondents, in respect to the provisions of this law, uses the following language in his printed argument: "No elector need lose his right to vote. No elector can do so, except by his own default or negligence in these particulars." If this were a correct statement of the effect of this law, then it might not be obnoxious to objection in the particular which, in our opinion, renders it unconstitutional and void. By the effect of this law, the elector may and in many cases must and will, lose his vote, by being utterly unable to comply with this law, by reason of absence, physical disability or non-age, and an elector can lose his vote, "without his own default or negligence in these particulars."

The language of the learned counsel is most strikingly suggestive of the very vice of this law, which is fatal to its validity. That vice is that the law disfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor and provides no method, chance or opportunity for him to make proof of his qualifications on the day of election, the only time perchance, when he could possibly do so. This law undertakes to do what no law can do, and that is to deprive a person of an absolute right, without his laches, default, negligence or consent, and in order to exercise and enjoy it, to require him to accomplish an impossibility.

No registry law can be sustained which prescribes qualifications for an elector additional to those named in the Constitution, and a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or method or regulations prescribed by law for such purpose and to such end, deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right and make the law itself as void as if it directly and arbitrarily disfranchised him without any pretended cause or reason, or required of an elector qualifications additional to those named in the Constitution. It would be attempting to do indirectly, what no one would claim could be done directly. It is quite immaterial to the point of this discussion, what this court may have decided in respect to the registry law of 1864, or other laws, any further than the establishment of a principle, which may be applicable to and govern this peculiar feature of the law of 1879, and the decisions of other courts in respect to registry laws, not having in effect this provision, need not be here reviewed. Without further discussion of original principles it is sufficient and conclusive of this case that this court in State v. Baker, 38 Wis. 71, virtually decided the question here raised, and established the principle which is applicable and fatal to this sweeping provision of disfranchisement found in section eight of the law under consideration. In that case the registry of a precinct was defective in substance and form, and yet the electors named therein are held to have been entitled to vote at the election, because they had no notice of such defect, and were themselves not in fault. In the able discussion of the subject as to the extent of legislative authority in regulating the exercise of the constitutional right to vote, by his honor the chief justice, which I need not generally repeat, it is said, touching this exact point: "The voter may assert his right if he will, by proof that he has it; may vote if he will by reasonable compliance with the law. His right is unimpaired; and if he be disfranchised, it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the Constitution," and again, "so one entitled to the franchise may be sick or absent or imprisoned or otherwise disabled, at the time of registry. But the Constitution vests and warrants the right at the time of election. And every one having the constitutional qualifications then may go to the polls vested with the franchise of which no statutory condition precedent can deprive him. Because the Constitution makes him by force of his present qualifications, "a qualified voter at such election." In case the voter knows or has notice that his name is not on the registry, the opinion further holds: "So that they have an opportunity if they will to remove the difficulty, each voter for himself by complying with the statutory condi-

tions. In such case if a voter be disfranchised, he is by his own omission a voluntary party to his disfranchisement." This language was clearly and pointedly illustrative of the real question in that case, and is authoritative in its application to the law of 1879, and conclusive of this case. The prohibition in sec. 8, is clearly unconstitutional and void. This section is the only portion of the act which provides for the legal effect and consequences of the registration or want of registration required and regulated by the other portions of the act and which are essential to the full force, purpose and efficiency of such registration, and of paramount importance, and constitute the only substantial change of, and material difference from the general law of the State requiring registration, and it is therefore quite apparent that the legislature would not have enacted the other portions of the act, had they foreseen that the courts would declare such part of section eight unconstitutional and void.

This case is therefore brought within the rule repeatedly recognized by this court for declaring the whole act void. Slauson v. City of Racine, 13 Wis. 398; State v. Dousman, 28 Wis. 541; Slinger v. Henneman, 38 Wis. 504.

The order of the circuit court sustaining the demurrer is reversed with costs, and the cause remanded to the circuit court for further proceedings according to law.

TAYLOR, J., dissents.

DIVORCE—DOMICIL.

BRIGGS v. BRIGGS.

English High Court, Probate and Divorce Division, May, 1880.

A was married to B in England, both parties being domiciled English subjects. A afterwards went to the United States in order to avoid his creditors, but it was not proved that he had abandoned his English domicil. He obtained a divorce in the State of Kansas on the ground of his wife's desertion, and was afterwards married in Kansas to C. *Held*, that the divorce in Kansas would not be recognized in this country, and that therefore A had been guilty of bigamy, and B was entitled to a decree for dissolution of her marriage with A.

This was a wife's petition for a dissolution of marriage on the ground of desertion, adultery, and bigamy, and was tried before the president of the division without a jury. The respondent did not appear. The facts of the case are fully stated in the judgment.

HANNEN, P., delivered the following judgment:

In this case Sarah Priscilla Briggs sues for a dissolution of marriage on the ground of her husband's desertion, adultery, and bigamy. The parties were married at Birmingham in 1862, both of them being at that time domiciled English subjects. In 1868, the respondent, being in difficulties, left this country to avoid his creditors, and went to the United States. After an unsuccessful attempt to establish himself in business at Cleveland, Ohio, he proceeded to Kansas, in which State, in June, 1873, he obtained a divorce from his wife on the ground of her desertion. In the following September he went through a ceremony of marriage with another woman, with whom he has ever since cohabited.

It is not essential for the petitioner's purpose that she should establish the charge of desertion, since the Kansas divorce is either valid, in which case her marriage is already dissolved, or invalid, in which case she is entitled to a decree on the ground of her husband's bigamy and adultery. In this state of things a decree of this court, whatever way it may be, will satisfy the object which she has in view, by defining her position towards her husband, and enabling her, if so disposed, to contract a fresh marriage. It is only of importance upon public grounds that the judgment of the court should be based upon principles which may be safely applied to future cases.

The first question to be considered is this—whether the respondent had, when he instituted his suit for a divorce, acquired a domicil in the State of Kansas. That is undoubtedly a difficult question, as to which opinions may differ. In the first place, it is clear that he did not voluntarily seek a new home. He left England through fear of his creditors. The letters from him to his wife which have been put in evidence show that he had not, down to the summer of 1872, abandoned the idea of returning here if, as he hoped, he could pay his debts, and there are several passages which seem strongly to indicate an *animus revertendi*. The *onus* of proving an intention to abandon the domicil of origin lies upon those who assert it. Now, although the respondent has not appeared to the petition, he has given evidence under a commission issued at the instance of the petitioner, and he does not allege that he has acquired a Kansas domicil. He merely swears that he has been resident in Kansas for twelve months before filing a petition for a divorce, and it appears, from the proceedings and from the evidence of an expert, that that is all that is required by the laws of Kansas to give jurisdiction to the courts of that State. No doubt it is possible that after writing these letters, and before filing his petition, the respondent may have formed a fixed intention of residing in Kansas; but, as I have said, it lies upon him to prove this, and he has not done so. Under those circumstances, it appears to me that it is not established that, at the time of commencing proceedings for a divorce, he had freed himself from the restrictions of the English law by abandoning his English domicil and acquiring a domicil in Kansas.

If this is a correct view of the facts, the law applicable to the subject is abundantly clear. This was an English marriage within the meaning of Lolley's Case, R. & R. 237, and it is governed by the resolution of the twelve judges that "no sentence or act of any foreign country or State could dissolve an English marriage *a vinculo matrimonii* for grounds on which it was not liable to be dissolved *a vinculo matrimonii* in England." Here the marriage was dissolved upon the sole ground of the wife's desertion, for which it could not

have been dissolved in England. It follows that in the courts of this country, whatever may be the case in Kansas, it must be regarded as a subsisting marriage, and the connection since formed by the respondent by marriage with another woman must be treated here as bigamous and adulterous.

This view of the facts renders it unnecessary for me to determine whether I ought to act upon the doubt expressed by Lord Westbury in Pitt v. Pitt, 12 W. R. 1089, 3 Macq. 627, as to whether "the domicil of the husband was in a case of this kind to be regarded in law as the domicil of the wife by construction or by abstraction, so as to compel the wife to follow the husband and to become subject for the purposes of divorce to the jurisdiction of the tribunal of any country in which the husband might choose, even for that purpose alone, to fix and to declare that he intended to acquire an absolute domicil"—a doubt, however, in which Lord Kingsdown stated he did not share. I am also relieved from the necessity of considering the effect of the wife having, as she alleges, received no notice of the proceedings in the Kansas court, the loose practice of that court having been satisfied by the husband's oath that he had posted to his wife in England a notice of his petition, and by publication of that notice in a Kansas newspaper during three weeks. This practice certainly illustrates, in a remarkable manner, the injustice which, as Lord Westbury pointed out, may be caused to a wife by allowing a husband to choose his own *forum*. Lord Kingsdown's opinion, on the other hand, seems to be in accordance with the conclusions of foreign, and especially American jurists on this subject.

For the reasons which I have stated, I pronounce a decree *nisi* on the ground of bigamy coupled with adultery and I condemn the respondent in costs.

RIGHT OF RAILROAD COMPANIES TO EJECT PERSONS FOR FAILURE TO PAY FARE—CONSTRUCTION OF STATUTE.

TOLEDO ETC. R. CO. v. WRIGHT.

Supreme Court of Indiana, November Term, 1879.

Section 28 of the Indiana statute which provides that, "if any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him off the cars at any usual stopping place," is permissive and not prohibitory in its terms, and under it a railroad company may eject such passenger between stations. A passenger who refuses to pay the regular fare is from that moment an intruder, and wrongfully on the train, and has no lawful right to be carried gratis to the next station, but may be expelled at once.

From the Huntington Circuit Court:

C. B. Stuart and *T. A Stuart*, for appellant; *W. H. Trammell*, for appellee.

HOWK, C. J., delivered the opinion of the court:

This was a suit by the appellee against the appellant, a common carrier of passengers, over its railroad, for hire, to recover damages for certain alleged breaches of its duty, as such common carrier. There were three paragraphs in the appellee's complaint; in each of which there was a general statement that, at the date mentioned and between the places named therein, the appellant was such common carrier of passengers for hire, over its line of railway. In the first paragraph of the complaint the appellee alleged, in substance, that on the 21st day of August, 1873, he entered one of the appellant's passenger cars, at the Town of LaGro, in Wabash County, for the purpose of being carried by the appellant in said car, as a passenger, from the said Town of LaGro to the Town of Huntington, in Huntington County, Indiana; that the appellant, "without any lawful cause, indignantly, insultingly, cunningly and maliciously and purposely extorted a greater amount of money" from the appellee, as a passenger, than was usual and customary fare of passengers between the above named places, charged by the appellant, to the appellee's damage in the sum of $100; wherefore, etc. In the second paragraph of his complaint, the appellee further alleged, in substance, that on or about the 27th day of August, 1873, he took passage upon one of the appellant's cars, at the Town of Wabash, for the purpose of being carried by the appellant in said car, from said Town of Wabash to the said Town of La Gro, as a passenger on said railroad; that the appellant "unlawfully, cunningly and maliciously and purposely extorted" from the appellee a greater amount of money than was the usual and customary fare of the appellant, for the carrying of passengers between the above named places—to the appellee's damage in the sum of $100; wherefore, etc. In the third paragraph of his complaint, the appellee alleged in substance, that on or about the 28th day of August, 1873, the appellee entered into one of the appellant's passenger cars, at the Town of Antioch, for the purpose of being carried in said car by the appellant, from said Town of Antioch to said Town of LaGro; that he so entered, with the appellant's knowledge and assent, for the purpose aforesaid, and then and there became and was a passenger on board the appellant's car; that after the appellant had carried the appellee, as such passenger, about two miles, in said car upon its railroad, towards said Town of La Gro, the appellant without any lawful cause, with force and violence, at a point othe than a usual stopping place for the appellant, and not near any dwelling house, ejected and turned the appellee out of and from said car, and then and there insultingly refused to carry him further, —to the appellee's damage in the sum of $4,800; wherefore, etc.

To the appellee's complaint, the appellant answered, in two parapraphs, in substance, as follows: 1. A general denial; and 2. That for a long time, the appellant had established a passenger tariff-rate, between stations along the line of its road from Ohio State line west to the Illinois

State line, including the stations in Wabash and Huntington Counties; that the regular fare from LaGro to Antioch, on the line of the appellant's road each way, was forty cents; that as a premium and inducement to pay at its station offices, the appellant discounted ten cents on every ticket purchased at such ticket-office; that it had an obvious policy in so doing, to put a check on those who handled passenger fare on the train; that on and at the times mentioned in the complaint, the appellee entered the cars at Antioch, with the avowed purpose of riding therein to LaGro, and, when called upon for his fare, tendered thirty cents and positively refused to pay any more; that he entered the cars with the avowed purpose expressed at the time, and while on the cars and at sundry other times, of testing the question of the appellant's right to charge and take on the cars the regular fare of forty cents between the said points; and that the appellee refusing, in a boisterous and insolent manner, to pay the said regular and established fare, and creating a disturbance of the other peaceful and well-behaved passengers, the appellant's conductor stopped the train, and put the appellee out, as on account of his said conduct, the conductor had a right to do; wherefore, etc. Before the filing of this answer, the appellant offered in writing to confess a judgment in favor of the appellee, for the sum of twenty-five dollars, in full of all damages by reason of the alleged wrongs stated in his complaint. The appellee replied by general denial, to the second paragraph of appellant's answer.

* * * * * * * * *

The issues joined were tried by a jury, and a general verdict was returned for the appellee, assessing his damages in the sum of $500. The appellant's motion for a new trial was overruled, and its exception was duly entered to this ruling; and the court rendered judgment for the appellee, upon the general verdict of the jury.

The principal error assigned by the appellant, in this court, is the decision of the circuit court, in overruling its motion for a new trial. In this motion there were many causes assigned for such new trial, consisting chiefly of alleged errors of law occurring at the trial and excepted to, in the admission of improper evidence, and in the instructions given the jury of the court's own motion and at appellee's request, and in refusing to give instructions asked for by the appellant. The appellant's counsel complain in argument, in this court for the most part, of the instructions given the jury, and of the refusal of the court to give the instructions requested by the appellant.

Before considering any question arising on the instructions, given or refused, we may properly give a brief statement of the case made by the evidence. The appellee was a witness on the trial, in his own behalf, and we give the substance of his evidence as follows: About the 21st day of August, 1873, he got on the appellant's cars at LaGro to go to Huntington, and paid his fare on the train to the conductor, who charged him sixty-five cents for the trip, which was ten cents more than what he, the appellee, thought was the usual fare between those places. On the 27th of August, 1873, he got on the appellant's cars at Wabash to go to LaGro, and paid his fare on the train to the conductor, who charged him thirty-five cents for the trip, or ten cents more than he had ever paid between those places; and although he had frequently rode on the appellant's road between those points, sometimes with and sometimes without tickets, he had always paid the same fare, to-wit, twenty-five cents.

On the evening of August 28th, 1873, he got on appellant's cars at Antioch, to go from that place to LaGro; and

"when the conductor came along and asked me for my fare, I asked him what it was to LaGro? He replied, 'forty cents.' I told him I thought he was mistaken. He remarked that it was forty cents. I said to him, 'You have carried me twice before this; once last evening; don't you remember it?' He said he did. Then he said to me: 'Do you say you will not pay me forty cents?' I told him I would not pay but thirty cents. He then said: 'I will put you off the train if you do not pay me forty cents;' the forty cents he repeated two other times. I said to him, 'If you think best you had better do it.' Then he looked out the window to the brakeman, and made motions to him to put on the brakes, and then began to pull the bell-rope. The train did not seem to check up, and he called out the door and spoke to the brakeman to tighten the brake, and he again begun to pull the bell-rope; and we got out on the platform by the crowd pushing from behind, and then again he asked me: 'Do you say again that you will not pay me forty cents?' I replied to him, 'I would not pay but thirty cents.' Then he told me to get off out the train, that he did not want to be waiting there. I looked to see what kind of a place it would be to be thrown off. There were several iron rails lying there and a ditch close by, and I concluded to get off without being pushed off, and I then stepped off. I told him all the other conductors charged the rate I named. He said they done wrong, no reason why he should. I think I acted quietly and peaceably, and think I did nothing out of the way. I had said nothing to any one, and saw no one I knew. My purpose was to go to LaGro. * * * * I am now in my sixtieth year. After being put off the train I went to LaGro; distance about three and one-half miles. I took the tow-path from the railroad crossing. I was about two or two and a half miles below Antioch; don't know the distance exactly. * * * * I think I had fifty cents in my hand, and offered to pay him thirty cents. He was very short, had but few words, made no explanations. I suppose he wanted a little spending money."

This is the substance of appellee's account of the matters on which he has founded this account. The first two matters referred to, in his evidence, are the matters of extortion counted upon in the first two paragraphs of his complaint. In his evidence he claims that ten cents were extorted on each two trips or occasions, making in the aggregate the sum of twenty cents. As the court below instructed the jury that the measure of damages would be, "upon the first two paragraphs of the complaint, the amounts extorted from the plaintiff by over-charging;" we may reasonably conclude, we think, that all the damages allowed the appellee by the jury in their general verdict, with the exception of the twenty cents extorted, were assessed upon the cause of action stated in the third paragraph of his complaint. With respect to this third paragraph, we have given the appellee's version, under the sanction of his oath,

of the matter counted on in said paragraph, in almost his exact language, as we find the same in the bill of exceptions containing the evidence.

Upon the case stated in the third paragraph of the complaint, and the evidence given on the trial, the Court of its own motion gave the jury trying the cause, the following instruction, to-wit: "3. In this State the law prohibits a railroad company from ejecting a passenger from the cars, for a refusal to pay his fare, except at a usual stopping place; and if you find from the evidence, that the defendant (plaintiff) was put off the train at a place remote from an usual place, for no other reason than that he refused to pay his fare—then the plaintiff is entitled to recover."

It is evident, we think, that this instruction was founded upon the court's construction of sec. 28 of the General Law of this State, providing for the incorporation of railroad companies, approved May 11th, 1852. This section reads as follows: "Sec. 28. If any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him out of the cars at any usual stopping place. 1 R. S. 1876, p. 709."

It would seem from the language used in the instruction above quoted, that the court must have construed the provisions of this sec. 28 of the statute, as amounting to a positive prohibition against any railroad company's right to put any passenger out of its cars, for his refusal to pay his fare, at any other place than a usual stopping place for its cars, on the line of its road. Such a construction of the section quoted is not required by the language used therein, and is not in harmony with the General Law of this State on the subject of the section; and therefore we are not inclined to adopt it. The section is permissive and not prohibitory in its terms. It allows a railroad company to do a given thing for a specified reason, at a certain place, but the law does not prohibit the railroad company, either in that section or elsewhere, from doing the same thing, for the same or any other valid reason, or at any other place. In the case of Jeffersonville R. Co. v. Rogers, 28 Ind. 1, it was well said by Frazier, J.: "The passenger, who refuses to pay fare, is from that moment an intruder, and wrongfully on the train. He has no lawful right to be carried gratis to the next station. This is too plain to admit of debate. It follows that he may be expelled at once." The case cited was again before this court, on a subsequent appeal, when the following language was used, in the opinion of the court, by Worden, C. J. (38 Ind. 116): "If the expulsion had been rightful in itself, it might, perhaps, have been legally effected at any time of day or night, and at any place, without reference to stations, or the convenience and comfort of the party expelled." The right of a railroad company to expel a passenger from its cars, for his refusal to pay fare, as a rule, at any time "and at any place without reference to stations," was not doubted nor questioned by the learned judge who wrote the opinion last referred to, but in that case, it was shown that the passenger, Rogers, before entering the appellant's car, had properly applied at the ticket office for a ticket, and without fault on his part, but through the wilfullness, mistake or inadvertence of its agent, had been unable to secure such ticket, and it was very properly held, we think, on those facts, that Rogers was entitled to be carried, by his payment to the conductor of the price of the ticket, and could not be required to pay in addition to such price, the excess which, by the rules of the company, was charged the passenger who, without an effort to purchase a ticket, paid his fare on the cars to the conductor of the train.

In the case last cited, and in the case of Indianapolis etc., R. Co. v. Rinard, 46 Ind. 293, the legal right of a railroad company to discriminate between the amounts of fare, where a ticket is purchased, and where the fare is paid upon the train, and to demand, exact and receive a larger fare, in the latter case, than the price charged for a ticket, is fully recognized by this court. In the case at bar, therefore, the appellant had the legal right to exact from the appellee for his fare between Antioch and LaGro, a larger sum of money when paid to the conductor on the train, than it would have charged him for a ticket, between the same places; and when the appellee refused, as he did, to pay the fare demanded, the conductor of the train had the right, and it was his duty as a faithful servant, to put the appellee out of the cars, and off his train, at any time and at any place, on the line of the road, without reference to stations, and without actual danger to his life or person. When he refused to pay his fare, he became an intruder, a mere trespasser in the appellant's cars; and he had the rights of a trespasser and no other rights. Certainly he had no right to be carried by the appellant, without charge, to the next station.

It would seem from the record before us, that there were no intermediate stations on the appellant's road, between Antioch and LaGro, only a distance of six miles intervening between said places. The appellee entered the appellant's cars at Antioch to go to LaGro, and when the conductor demanded his fare the train was very nearly equidistant between the two places. When he refused to pay his fare, it surely was not the appellant's duty to carry him to LaGro, the place of his destination, before putting him off the train. Yet if the court's construction of said sec. 28 of the statute, as contained in the instruction above quoted, were the correct one, the necessary consequence would be that all railroad companies in this State could be compelled to carry all their passengers gratis to the next "usual stopping place."

It is claimed by the appellee in this case, and it was so testified by him as a witness on the trial, that he had never heard before that an extra charge was made for fare when paid on the train. It is difficult to reconcile and harmonize the appellee's evidence in this regard, with the two first paragraphs of his complaint and his evidence in support of said paragraphs. For, in those paragraphs, he claimed, and his evidence tended to sustain such claim, that, within one week prior to

this attempted trip from Antioch to LaGro, the appellant's conductor, on two different occasions of trips, extorted from him on the train ten cents on each trip more than the usual or customary fare. It is difficult to believe that he had so recently suffered the loss of these two sums of ten cents each by extortion, as he claimed, without having inquired into and ascertained, as he might easily have done, the probable cause or pretext for such alleged extortion. But, however, this may have been, it is not claimed or pretended, that he could not have readily ascertained, by proper inquiry, the rules and regulations of the appellant in regard to the purchase and price of tickets, and the payment of passenger fare on the train. If he did not know the appellant's rules on these subjects, he ought to have inquired of its agents, before he became a passenger on its cars. It is not claimed that he did not have an abundance of time and ample opportunities to make all proper inquiries and purchase a ticket of the appellant's agent at Antioch before he entered the cars. Having failed to purchase a ticket, or to ascertain the rules of the appellant in regard to the payment of passenger fare on the train, he was in fault; and when the conductor demanded of him ten cents more than what he supposed was the regular fare, he should have paid the money and investigated the matter afterwards. Upon his refusal to pay his fare, the conductor was fully authorized and justified, as we have already said, in putting him out of the cars and off of the train, at any place not dangerous to his life or limbs.

For the reasons given, we are of opinion that the court's instruction, above set out, to the jury trying the cause, was erroneous and ought not to have been given; and on this ground, a new trial ought to have been granted.

[Omitting several minor points.]

HOMESTEAD—DIVORCE—DESERTION.

BLANDY v. ASHER.

Supreme Court of Missouri, May, 1880.

1. Under the Missouri Homestead Act, a wife by obtaining a divorce does not lose her homestead right previously obtained by filing her claim according to its provisions.

2. Desertion by the husband, leaving his family still occupying the homestead, is not an abandonment of the homestead.

Appeal from Gentry Circuit Court.

SHERWOOD, C. J., delivered the opinion of the court:

The questions presented by the record are: 1st, Was the right acquired by the wife by reason of her filing her statutory claim to the homestead lost in consequence of the divorce which she subsequently obtained? 2d. Even if such right was defeated and determined as to the wife by the judgment which dissolved the marital relation existing between the parties, does such overthrow as to the wife's right in the premises, entitle plaintiff to be successful in this action? These questions will be considered in the order presented.

No one can read with any degree of attention the provisions of our Homestead Act, without reaching the same conclusion arrived at by most courts in constructing similar legislative enactments, that such provisions, were designed to mark out a course of enlightened public policy, whereby each family might secure a shelter, a place of refuge against the storms of financial misfortune, which the greatest amount of human prudence and sagacity can not always avert. Taking such a view, courts have for the most part held that these homestead laws being of a liberal and beneficent nature, being designed to prevent pauperism and vagrancy, and their consequent temptations to crime, should not be dwarfed, and their evident purpose thwarted, by a narrow and illiberal construction. Thompson on Homesteads, § 1 *et seq.* and cases cited. Such statutory exemptions respecting land are not in derogation of common law, and, consequently, not to be strictly construed, because the whole matter of the sale of real estate under the *fi. fa.* and likewise its exemption from such sale, is of purely statutory origin and regulation. Id. §§ 2, 3 & 4.

The law under which Alice Asher filed her claim is as follows: "The homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances, and the land used in connection therewith * * * * * shall, together with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided * * * * and any married woman may file her claim to the tract or lot of land occupied or claimed by her and her husband, or by her if abandoned by her husband, as her homestead; said claim shall set forth the tract or lot claimed, that she is the wife of the person in whose name the said tract or lot appears of record, and said claim shall be acknowledged by her before some officer authorized to take proof or acknowledgment of instruments of writing affecting real estate, and be filed in the recorder's office, and it shall be the duty of the recorder to receive and record the same. After the filing of such claims, duly acknowledged, the husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever. Every such sale, mortgage or alienation is hereby declared null and void, and the filing of any such claim as aforesaid with the recorder shall impart notice to all persons of the contents, etc." This law went into effect March 24th, 1873. See Laws 1873, p. 16, §1.

The judgment upon which plaintiffs rely was rendered against Lewis Asher and William Asher, March 12th 1873, the execution issued and levied two days thereafter, and the sale occurred Sept. 1st of that year. Prior to that sale, August 23d 1873, the then wife had filed her claim to the homestead. She obtained a judgment of divorce at the September term 1875. Lewis Asher, her husband, left her, August 11th 1872, and returned

but once, and that was about three years before the trial of this cause at the September term 1876. The place claimed by Alice Asher had been occupied and resided on by herself, husband and a family of children as a home from 1864 up to the time he left; and since that time, she and her minor children had continued thus to reside on and occupy it; and she was in fact, if not in law, the head of the family.

The above being, then, the facts in this case, the question proposed at the outset recurs: Did the wife by the exercise of her statutory right to obtain a divorce, lose her previously acquired statutory right to her homestead?

In State v. Pitts, 51 Mo. 133, it was said: "The legislature in the provision of the law respecting homesteads, uses the broadest language and exempts from attachment and execution, the home in all cases except as therein provided." And so it was held in that case, that though in general the State is not within the purview of a statute unless specially named, yet as no reservation was made in the Homestead Act, in favor of the State, the homestead of the defendant could not be sold under an execution issued in the name of the State, on a forfeited recognizance. Neither in instances like the present, does the Homestead Act make any reservation in favor of a creditor, as against the homestead of the wife who, abandoned by her husband, files her claim and secures her homestead because of the very fact of such abandonment. It is to be observed that while the statute under consideration is careful to provide a way whereby a woman, abandoned by her husband, may gain a homestead, that statute nowhere provides any means whereby the homestead thus gained shall be forfeited and lost. And who shall gainsay the statute? The rule of the statute is the exemption of the homestead; and that exemption prevails "except as therein provided," State v. Pitts, *supra*.

By the express terms of the statute, after the wife's claim is filed, the husband is "debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever; and every such sale, mortgage or alienation is hereby declared null and void." And the only exception to the entire inalienability of the wife's homestead thus acquired, is that provided by a subsequent clause of the same section, where, by her own voluntary act, she may join with her husband in conveying such homestead. Under a somewhat similar statute in Illinois, where the amendatory act of 1857 prohibited alienation by the husband without the concurrence of the wife, it was held that the statute as amended created a homestead exemption in her as against the creditors of the husband and his alienees. Turner v. Bennett, 70 Ill. 263.

But it is said that the section I have quoted "is designed for the benefit of abandoned wives, not divorced wives." This position, however, though somewhat plausible and ingenious, is untenable, and it is untenable for this reason if for no other: It would require an interpolation of the statute with words to this effect: "Provided, however, that whenever the wife thus abandoned, shall obtain a divorce because of such abandonment, she, and her minor children, may be forthwith ejected from the homestead acquired as aforesaid, by any creditor who theretofore may have sold such homestead under execution issued against such former husband." I know of no authority and possess no inclination to thus judicially legislate. And yet it is only by means of such judicial legislation that plaintiffs' position can be upheld, for the statute as it stands uses no such language as that used by way of illustration, nor any language from which a similar meaning can be inferred. And it would be strange indeed if the law were otherwise than I have stated; strange indeed that the legislature should so seduously, should with such emphatic language, prohibit the husband from disposing of the homestead, and yet permit the deserted wife, divorced, because deserted, and her helpless little ones, to be ruthlessly expelled at the instance of some rapacious creditor from the very shelter which the law said should be hers upon the filing of her claim to that effect. Surely a law conducing to such harsh results would possess no single attribute entitling it to be called "beneficent or humane in its character," "liberal, wise, and benevolent," or as one "especially designed to guard the wife and children against the neglect, the misfortunes and improvidence of the father and husband." State *ex rel.* v. Diveling, 66 Mo. 375, and cases cited.

The reason of the law is said to be the life of the law. If the Homstead Act is especially designed for the protection of the wife and children, how does the reason for their protection cease, because the wife is separated from her husband by desertion instead of by death? And how is the necessity for that protection diminished because the fact of abandonment gives simultaneous origin to the right of homestead and the right of divorce? The same law which gives the deserted wife the right of homestead, gives to the widow a similar right. But I suppose it would scarcely be contended that a widow who should re-marry, would thereby cease to be the widow of the decedent, within the meaning of the Homestead Act, and consequently disenabled to continue to hold her homestead in that capacity. And still such contention would very closely resemble the distinction attempted to be drawn here between an abandoned wife, and a divorced wife. The statute recognizes no such distinction and every consideration of sound reason as well as the contemplation of the purpose and policy of the statute, forbid that it be entertained. I concede that the first section of the amendatory act of 1873, above quoted, does not say that on the filing of the wife's claim, the homestead shall "pass to and vest in" the wife as does the fifth section of the original act in regard to the widow, but language tantamount to that in its practical effect, as against the husband, his alienees and creditors, is employed. Turner v. Burnett, *supra;* language much broader than that of the Illinois statute; language which confers on the abandoned wife the affirmative right of making claim for a homestead, and then, after the claim is

made, and the homestead secured, exempts that homestead from "attachment and execution," and pointedly prohibits its alienation, "in any manner whatever," by the husband.

I have been able to find no adjudicated case directly in point which fully supports the view here expressed, but have found two which enunciate a similar rule. In Sellon v. Reed, 5 Biss. 126, a wife in the possession of the premises as her home, filed her bill for and obtained a divorce from her husband, and the decree awarded to her the custody of her minor child, as well as alimony. The only defense set up to the ejectment brought by the alienee of the husband, was a right of possession under the Homestead Act, and the defense was held good. Blodgett J., remarking: "Following the spirit of the adjucations so far made by the courts of this State, I think the defense set up is made out by the facts. The principle of those decisions seems to be that the homestead estate is carved out of the general estate and vested in the head of the family. The wife cannot be divested of her homestead right, without a deed solemnly executed and acknowledged by her in the manner pointed out by the statute. In this case, the wife acquired her homestead right in the property, and at the time the divorce was applied for, was living thereon as her home. By the decree of divorce, she is charged with the custody and care of the child and thus continued as the head of the family." The learned judge then proceeded to quote from Vanzant v. Vanzant, 23 Ill. 536, where the Supreme Court of that State, (although in a case not requiring the point to be decided as the wife was held otherwise entitled to the premises) said: "The intention of the act is manifestly, to save the homestead for the family, and there is the same necessity for a home when the householder is living, as when he is dead, hence, the right to their homestead, not having been released by Vanzant, enures to his family. The question now arises, did the divorce of a wife destroy this right? The natural death of the householder would not destroy it, nor would his civil death for crime. If this was not so, the object of the act would be defeated and the beneficence of the legislature of no avail. The wife was the meritorious cause of the divorce—the children composing the family were committed to her care and nurture, and have in our judgment, and undoubted right to occupy the homestead. As a home, and as their home, it has never been granted away, or the right to occupy it released or waived by any one competent to release or waive it. The spirit and policy of the homestead act seems to demand this concession, and to regard the complainant, for this purpose as a widow and the head of the family." In Bonnell v. Smith, 53 Ill. 375, it was held that where the wife of a party having a homestead right, obtains a divorce from him, she being the meritorious cause thereof, and the custody of their child being committed to her, she became the head of the family, and the homestead right passed to her as such, by operation of the statute, and could not be defeated by sale under execution occurring subsequently to the divorce but issued on a judgment rendered prior to the divorce.

I am unable to distinguish this case in point of principle from the one just cited. It is true that the record does not disclose that the children were awarded by the judgment of divorce to the custody of their mother, but I cannot regard this as materially affecting her homestead right. She was to all intents and purposes, in fact, if not in law, the head of the family, and entitled to all the benign protection which the Homestead Act was designed to confer. Guided by the foregoing reasons and authority, I am of opinion that the divorce of the wife did not alter her *status* so far as concerns her homestead right; that by filing her claim that right became fixed and absolute as against the husband and his voluntary or involuntary alienees, a right which neither the decree of divorce, nor a judicial sale could alter, take away or lessen. And it may be remarked in conclusion that I should take the same view of the point in hand, whether I construed the statute in question liberally or otherwise. A liberal construction would certainly tend to the conclusion announced, but if it be true that the creditor as well as the debtor has no rights under the exemption laws except those conferred by these laws, then the same result will attend, at least so far as concerns the present case, a strict as well as a liberal construction of them.

But concluding that there is a distinction to be taken between a wife abandoned, and a wife divorced; concluding that the divorce accomplished all that plaintiffs claim it did, are they bettered by such concession? I think not, and for these reasons: It does not appear that Lewis Asher ever gained another homestead. Now, if a residence be gained it is presumed to continue until a new one is gained. Cadwalader v. Howell, 18 N. J. Law, 138; and so of a homestead. Mr. Thompson says: "It has been frequently decided that the act of desertion by the husband cannot have the effect of changing the home of either the husband or his deserted family." Thompson on Homesteads, § 277, and cases cited. This was the ruling in Moore v. Dunning, 29 Ill. 135, Catron, C. J., remarking: "The only question, therefore, is, whether the desertion by the husband, leaving his family still occupying the homestead, was an abandonment of it as a homestead. To this there can be but one answer, which is in the negative. This place still continued the home and residence of the husband, as well as his family, at least until it is proved that he acquired a home and a settlement elsewhere,—and this the law can never assume he has done. The presumption is that he continues a wanderer, without a home, until he returns to his duty and his family." This ruling was followed in White v. Clark, 36 Ill. 285, where ejectment was brought against the wife, and she had not relinquished her homestead right, and it was ruled that the execution sale passed for nothing, and upon these facts appearing, a *prima facie* case was made out, and the burden was on plaintiff to show that his case fell within some of the exceptions of the statute. So it will be ob-

served that even if the decree of divorce accomplished all plaintiff claims it did, even if it defeated and overthrew the wife's rights, and made her a mere trespasser and unwelcome intruder in her former home, still plaintiffs' case is not bettered thereby, because if that was the effect of the decree of divorce, a statement which I deny, inasmuch as no new homestead appears to have been gained by the husband, his old one will be presumed to continue, in which event plaintiffs certainly could not eject the children of the husband and father, Lewis Asher, without making him a party defendant to the action, as he then would be the head of the family, and his rights could not be affected unless thus made a party.

Notwithstanding the conclusions already announced, the judgment must be reversed, because the testimony showed that the land claimed by Alice Asher exceeded in value the statutory limit, and the declarations of law given in behalf of the defendant, ignored the question of value.

The judgment will be reversed and the cause remanded. NAPTON and NORTON, J. J., concur; HOUGH and HENRY, J. J., are not of opinion that the former wife is entitled to a homestead.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MICHIGAN.

June, 1880.

INVITING DANGEROUS AGENT — SUFFERER CAN NOT RECOVER—FIRE.—1. S & Co, the owners of a warehouse, owned likewise a track running thereto, and employed a railroad company to send an engine to draw cars over it for their accommodation. The engine threw out sparks, and this they observed and complained of, but nevertheless continued to make use of it for a long time. At last the warehouse was set on fire and burned from the sparks emitted by it. *Held*, that S & Co could not recover for the injury. This was not the case of a defective locomotive moving through the country and scattering desolation among those to whom its proprietors owed the duty of a care corresponding to its dangerous nature; but it was a case of private employment, whereby the proprietors of the engine were solicited to send it upon the private business of the employers into a place where the latter well knew, and had for a long time known and understood, it was likely to do mischief. [illegible] was negligence on the part of the railroad company, it was to be found in consenting to be thus employed. There is just the same and no more reason for plaintiffs to complain of it, than there would have been had they hired the owner of a vicious animal, known by them to be such, to bring him for their purposes upon their premises, and then been injured by him, as they should have anticipated they might be. That which one consents to, and invites, he can not complain of in the law as an injury. Motz v. Detroit, 18 Mich. 495; Maxwell v. Bridge Company, 41 Mich. 453. 2. When there is a promise to repair immediately, or within a fixed time, and a party relies upon its having been done, and is injured because of such reliance, he has a right to complain, but this is no such case. In this case the promise was to repair "sometime." The promise was wholly indefinite, and plaintiffs never relied upon it except as a probable future event. They knew the repairs had not been made when they employed the engine on the day of the fire, and they deliberately and most carelessly took the risks of what actually happened. Reversed. Opinion by COOLEY, J.—*Marquette etc. R. Co. v. Spear.*

COLLISION ON THE HIGHWAY—NEGLIGENCE—RECOVERY.—J sued L for driving his wagon against a wheel of his buggy, and breaking it. J had hitched his team to a post by the side of a highway, in such a manner that the buggy stood out diagonally in the street, between sixteen and seventeen feet. This brought the wheels so near the track which was actually traveled, that when L's wagon was passing along the way, J's horses backed the buggy about a foot, so as to produce the collision. J claimed that L should have left the track which was actually taken, and turned out. L claimed that the occurrence was either accidental, or owing in part to J's own carelessness. He also claimed that there was no negligence at all on his part. The jury found for the defendant. *Held*, that the verdict was proper. As the jury found the defendant was traveling in the beaten track, there could not be a finding that he was on the wrong side, and he could not be presumptively in fault for not turning out of it, but negligence in not doing so must be proved. There was no error in refusing to charge otherwise. But we think that when it is found that J left his horses so hitched that so slight a backing as they made would necessarily bring the wheel into the traveled track, that was such negligence in itself as would preclude him from complaint for such a mishap. Nothing else could be expected without very considerable care and forethought on the part of passers-by, and as even their negligence would create no liability if he was negligent, the cause of action can not be made out under such a finding. Affirmed. Opinion by CAMPBELL, J.—*Joslin v. LeBaron.*

DIVORCE—EVIDENCE OF YOUNG CHILDREN WILL NOT BE REGARDED.—Action for divorce on the ground of adultery. There is no direct evidence of the alleged offense, but circumstances of a suspicious nature are sworn to by two children of the parties, the eldest of whom was twelve years of age when sworn, and both of whom would seem, if their evidence is trusted, to have precocious understanding of the nature of criminality of the conduct charged. We had occasion in Kneale v. Kneale, 28 Mich. 344, to comment upon the manifest impropriety of calling children of such tender age to testify against their mother to establish an offense against chastity. It is a great wrong to them, not only as it touches them in their natural affections, but also as it tends to destroy their purity of mind and conduct. Moreover, the evidence of such children to acts which will naturally be construed by their prepossessions and immature and incorrect notions, is of very slight value, even when honestly called out and given, and is easily shaped and perverted if a dishonest father shall be so inclined. We shall not grant a divorce upon such evidence, unsupported, and there is not much other evidence in this case. Decree reversed and bill dismissed. Opinion by COOLEY, J.—*Crowner v. Crowner.*

SUPREME COURT OF INDIANA.

May Term, 1880.

EXECUTOR—POWER OVER DEBTS OF TESTATOR.—An executor, in this State, has a general, and, in many respects, an absolute power over the debts due

the estate of his testator. Where done without fraud or collusion, he may assign or release such debts, and may exercise general acts of ownership over them in regard to their security or collection, subject only to his liability on his bond for any loss which may occur by reason of his mismanagement of such debts. 2 Williams on Ex. 932; 39 Ind. 241; 57 Ind. 198. The power of an executor to extend the time of payment of a debt, appears to be plainly inferable from his other powers. The evidence does not sustain th verdict. Judgment reversed. Opinion by NIBLACK, J.—*Underwood v. Semple.*

LEASE — ASSIGNMENT OF TERM—MERGER. — A leased certain premises to B for a term of five years, at a stipulated rental of $500 a year. Subsequently B sold and assigned the leasehold, when there were still a number of years to run, to C, at a rental of $37.50 per month, to be paid monthly. C soon afterwards became the owner of the premises in fee simple by conveyance from A. *Held*, that when C became the owner of the premises in fee simple, the unexpired term of the leasehold estate was merged and extinguished in his estate in fee; and C, having become both landlord and tenant in one and the same estate, the tenancy ceased, and the rent reserved also ceased and was determined, and C could not maintain an action against B for said rent. Affirmed. Opinion by HOWK, J.—*Liebschuetz v. Moore.*

PROMISSORY NOTE— EFFECT OF ANTEDATING—JURISDICTION OF JUSTICES—FRAUD.—1. The maker of a note has the right to antedate it, and having done so, and it being payable one day after date, the note becomes due one day after the date it bears, without regard to the date of its execution. 2. Notes not payable in bank in this State are not negotiable as inland bills of exchange, and three days' grace will not be allowed thereon. 1 R. S. 636, sec. 14; Benson v. Adams, decided May 14, 1880. 3. When a party holds a number of notes executed by the same maker and bearing the same date, he has the right to bring a separate suit on each, on the same day, before a justice of the peace; and each of the notes thus sued on being within his jurisdiction, the justice has a right to render separate judgment on each of them on the same day, without reference to the aggregate amount of the notes. 4. Fraud is never presumed, but must be proven; and in a case where a restraining order is sought to prevent the sale of property on execution, on the ground that the notes on which the judgments were rendered, upon which the executions issued, were given with a fraudulent intent and for a fraudulent purpose, the question of fraud is one of fact for the jury to determine. 36 Ind. 7; 44 Ind. 209; 57 Ind. 274. In the case at bar, the jury determined the question of fraud adversely to appellants, and their verdict was sustained by the evidence. Affirmed. Opinion by HOWK, J.—*Luce v. Shoff.*

SUPREME COURT OF IOWA.

June, 1880.

TRADE-MARKS—INJUNCTION.—1. S had been for many years engaged in the manufacture of wagons at Eldora. The business, for a time, was prosecuted by copartnership, composed of S and the defendants, his brothers, and another person. Upon the dissolution of this copartnership, S continued the business and acquired all the property of the firm. For several years S conducted the business on his own account, and sometime before his brothers commenced business for themselves they had been employed by S. In 1874, S adopted as a trade-mark the words "Shaver Wagon, Eldora," which was, at first, with some variation in form, painted conspicuously on all wagons manufactured and sold by him. He adhered to a general style of work and painting, and his trade-mark for the last few years had been painted upon his wagons in substantially the same form and manner. The defendants, more than two years after they ceased to be copartners of S, commenced the manufacture of wagons, and painted thereon the identical words used as a trade-mark by S. They changed somewhat the form of inscribing the words, and painted their own initials near to the trade-mark. The wagons, in general style and painting, resembled those manufactured by S, and were not inferior thereto. They did but little of the business before this suit was commenced, constructing and selling but one or two wagons. On a bill filed by S to enjoin the use of the trade-mark: *Held*, that the injunction must be granted. 2. The court below excluded the following testimony offered by defendants, viz.: That the "scroll work" upon which plaintiff caused his trade-mark to be painted was generally used in painting wagons; that plaintiff had never called the words "Shaver Wagon, Eldora," his trade-mark, and had not instructed his painter to put it on; that the wagons sold by defendants were disposed of without regard to the trade-mark; that the painting of defendants' wagons is readily distinguishable from that of plaintiff, and that they are different in size; that defendants' wagons were not sold because of any notoriety on account of the trade-mark, and that defendants had not sought to increase their sales by means of the trade-mark. *Held*, no error. Affirmed. Opinion by BECK, J.—*Shaver v. Shaver.*

EVIDENCE—BASTARDY—EXHIBITION OF CHILD TO JURY TO SHOW RESEMBLANCE TO ALLEGED FATHER.—In a prosecution for bastardy on a complaint made by one Reka Helm, the court permitted the State to exhibit the child to the jury for the purpose of showing a resemblance between the child and defendant; also in his speech to the jury the counsel for the State made use of this language: "I only wish to call the attention of the jury to what any one can see plainly with half an eye, that the eyes of this exhibit (the child) are hooked, and that also the eyes of the defendant are hooked, and that the eyes of Reka Helm are not." This statement was objected to by defendant, but the objection was overruled. The child was two years and a month old. *Held*, no error. "The defendant claims that any resemblance, if it should be thought to exist between such a child and a man alleged to be its father, is too unreliable to constitute legal evidence of the alleged paternity. It is a well-known fact that resemblances often exists between persons who are not related, and are wanting between persons who are. Still, what is called family resemblance is sometimes so marked as scarcely to admit of a mistake. We are of the opinion, therefore, that a child of the proper age may be exhibited to a jury as evidence of alleged paternity. Precisely what should be deemed the proper age we need not determine. It was held in State v. Danforth, 48 Iowa, 43, that it was error to allow a child three months old to be exhibited. That case is relied upon by the defendant in this. But a child which is only three months old has that peculiar immaturity of features which characterizes an infant during the time it is called a babe. A child two years old or more has, to a large extent, put off that immaturity. In allowing a child of that age to be exhibited we think the court did not err," expressly as it instructed the jury that if they did not clearly see such resemblance they should disregard all claims of resemblance on the part of the

State. Affirmed. Opinion by ADAMS, C. J.—*State v. Smith*.

NEGLIGENCE– FELLOW SERVANTS—IOWA STATUTE GIVING ACTION AGAINST MASTER—CONSTRUCTION. —1. A detective in the employ of a railroad company, and an engineer operating an engine on said road, are fellow-servants, or co-employees. 2. Section 1307 of the Code, provides as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of any neglect of agents, or by any mismanagement of engineers or other employees of the corporation; and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. *Held*, that the statute does not embrace those only who are engaged in the actual operation of a railroad in running the trains. Trackmen, switchmen, and others, whose duty requires them to be upon the track, are more or less exposed to the hazards of the business of railroading, and such employees, when injured by the use or operation of the road, and by the negligence of co-employees, are as plainly within the provisions of the statute as those whose duty requires them to assist in the running of trains. The proper test in determining the question is, does the duty of the employee require him to perform service which exposes him to hazard peculiar to the business of using and operating a railroad? If it does, and if, while in the line of his duy, he, by the negligence of a co-employee, receives an injury from a passing train, or from other appliances used in the use and operation of the road, he may recover. 3. The plaintiff, a detective employed by the defendant to apprehend certain parties, averred in his petition that he was acting under the immediate direction and instruction of the defendant, by its agent, Wood; that he was directed to walk along on the track of the road to a house by the road side; that as he was walking along on said track, in obedience to his instructions, he was, from sun-stroke or some other cause, prostrated upon the track in an insensible condition; and that, while in that condition, he was injured by the engineer of a passing train negligently running the train upon him. *Held*, that the plaintiff was within the section of the Code just cited. The allegations of the petition must be accepted as true, however incredible they may appear. It is not for the defendant to say that the plaintiff's duty did not require him to walk upon the track, because it is averred that the defendant, by its agent, directed him to walk there. If this was an absurd or foolish order, or if it was attended with seemingly unnecessary danger, it was not in itself negligence in the plaintiff to obey the directions given to him. If a track-walker, whose duty it is to patrol a track in the night, should be prostrated by apoplexy or the like, and the engineer of a passing train should negligently run upon and injure him, there can be no doubt he would have a right of action. The case at bar presents the same state of facts, with the exception that probably a track-walker could not properly perform his duty without walking between the rails. The plaintiff might have performed his duty as a detective without walking upon the track, but the averment is that the defendant required him to do so, and we must accept that averment as the truth, for the purposes of this appeal. Reversed. Opinion by ROTHROCK, J.—*Pyne v. Chicago etc. R. Co.*

SUPREME COURT OF WISCONSIN.

May, 1880.

MUNICIPAL CORPORATIONS — BEAR SHOW IN STREET—LIABILITY FOR NEGLIGENCE OF OFFICERS. —The fact that a license is granted by the city officers for a bear show will not make the city liable for damages resulting from the negligence of its police officers in not preventing the show being held in the street. Action for injuries caused by the frightening of a horse by a bear show in the streets of the city. The judge below instructed the jury that the city was liable if its officers were negligent in not preventing the show in the street. *Held*, error. The distinction seems obvious between a case where the officers of the city authorize and license a show in the highway—that is, become themselves active agents in the commission of the wrong—and where they are merely negligent in preventing such show or improper use of the street. Doubtless the city officers were in duty bound to be diligent to prevent the show in the street where it might cause injury to persons traveling thereon. But if they failed to perform that duty, and an injury resulted from this omission, we do not understand that the law renders the city liable for such neglect. It was further suggested that the liability of the city arose from the fact that it granted a license for the exhibition, for which a fee was received which went into the city treasury. But this fee was not exacted merely for revenue. The granting of licenses for shows was a police regulation, and the fee demanded was not intended to be for revenue, strictly speaking. It appears in this case that the license was a general one "to give a bear show" on the day named. It was not necessary to state in the license that the exhibition was to be at a proper place, away from the public street. This would be implied. As a matter of fact, it appears that Carr was told by several of the officers of the city that he must not exhibit the bears on the street, but go off on to some private lot. Still, we must assume that the jury found, under the charge of the court, that the officers were negligent in not taking effectual means to prevent the exhibition on the street before the accident happened; that is to say, they were guilty of a nonfeasance, or an omission of duty as public officers. But for such negligence no action will lie against the city. Schultz v. City of Milwaukee, *supra*. Even the granting of a license did not, under the circumstances, impose upon the city the responsibility of seeing that the exhibition was had in a suitable place, and conducted in a proper manner. All this would be implied; the licensee would attend to himself. Nor should the receipt of a license fee be considered as affording a consideration for an implied undertaking on the part of the city to be answerable for the neglect of its police officers to perform their official duty and prevent the exhibition in an improper place. The show licensed was not necessarily dangerous to travelers on the streets, or to any one, if it had been held on a private lot, as the city officers doubtless expected it would be. Reversed. Opinion by COLE, J.—*Little v. City of Madison*.

ADULTERY — MEANING OF THE TERM — MARRIED MAN AND UNMARRIED WOMAN.—A married man who has illicit intercourse with an unmarried woman is guilty of the crime of adultery. There are, undoubtedly, many authorities which hold that adultery can not be committed with a single woman; that even where her paramour is a married man it is only fornication. But our statute, on the subject of divorce, says nothing about fornication, and it has been the common understanding that illicit intercourse by the husband, with an unmarried female, amounted to a sufficient cause

for nullifying the marriage contract under that statute. The same idea as to what constituted adultery seems to have been in the mind of the legislature when prescribing punishment for the offense, perhaps derived from the early decision above referred to. At all events, we should be unwilling to hold, after the practical construction which the divorce law has received since the organization of the State government, that the offense in the information amounted only to fornication, and not adultery. The difference of professional opinion in this country, as to what constitutes adultery, has arisen from the different codes under which the subject has been considered. Mr. Wharton alludes to this matter in his work on Criminal Law, where he says: "Adultery, by the Roman law, was confined to illicit sexual intercourse with a married woman, the woman and her paramour being principals in the offense. A married man, who had illicit intercourse with an unmarried woman, was not guilty of this specific crime." 2 Crim. Law, § 2644. The same learned author adds: "But Christianity, speaking through the canon law, materially modified this feature of Roman jurisprudence. * * * Hence, the offense was committed by a sexual violation of the marriage vow, be the offender male or female. The married man having sexual intercourse with a woman other than his wife was as guilty of adultery as a married woman having sexual intercourse with other than her husband." Sec. 2645. We have no doubt that the word "adultery," as used in sec. 4676, was intended to include the illicit sexual intercourse of a married man with an unmarried female, and we must so hold. It would subserve no useful purpose to go over the authorities for and against this conclusion. Opinion by COLE, J.—*State v. Fellows.*

CONTRACTS FOR DELIVERY OF GRAIN — WHEN VOID.—Contracts in writing for the sale and delivery of grain at a future day, at a price certain, made with a *bona fide* intention to deliver the grain and pay the price, are valid in law; but when such contracts are made as a cover for gambling, without intention to deliver and receive the grain, but merely to pay and receive the difference between the price agreed upon and the market price at some such future day, they come within the statute of gaming, and are void in law. To uphold such a contract, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as an evasion of the statute of gaming, or as a cover for a gambling transaction. Reversed. Opinion PER CURIAM.—*Barnard v. Backhous.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

10. In 1876 H sold hotel furniture to D. D and C executed their joint and several promissory note payable to H to secure the payment of the purchase price. D failed to pay for the goods. C paid H, and H delivered the note to C. C sued D for the amount of the note and interest, got judgment and had execution issued. Are those goods in the hands of D exempt from sale under said execution, they being all the property owned by D. D is the head of a family, a resident of this State, and the property is worth $300. P. S.

Princeton, Mo.

11. Fifteen years ago the town of Z was organized. At or about the organization the company dug a ditch, which turned the water from its natural course and let it upon the land of one N. Subsequent to this time, N sold the property to M. In the spring of 1880, the water came down the said ravine, and through the said ditch, and overflowed the lands of the said M, and destroyed his crops. Has he a remedy against the town company

Louisville, Mo. Q.

12. In the exercise of the right of eminent domain in the State of Missouri under the Constitution of 1875, art. 2, sec. 21, can damages to the owner of the land to be taken, be set-off by benefits accruing to the owner on account of the proposed improvement? Is not the Constitution absolute, and sec. 6938 of Rev. Stat. of 1879, permitting such damages to be set-off by benefits, unconstitutional? Must not the actual value of the land taken be paid for in money? Must not the jury provided for in sec. 21 of art. 2 be composed of twelve men? Does not the phase "of not less than three freeholders," qualify "board of commissioners," and not the word "jury?" Is not sec. 6938, above referred to unconstitutional, because it provides for a jury of three men instead of twelve? P. Q.

Mexico, Mo.

13. In Ohio, if application be made to the Probate Court for letters of administration upon the estate of a person who is proved to have left his friends, gone to parts unknown, and to have been absent and unheard of for a period of more than ten years; and upon such application and proof, if the probate judge refuses to grant letters for the sole reason that he is not satisfied of said person's death, what remedy, if any, have the heirs of said person, and how, if at all, can they obtain possession of personal property and money, left by said absent person. Statute of Ohio reads, "Upon the decease of any person, etc., letters of administration shall be granted by the Probate Court, etc." P.

Mansfield, O.

14. A widow purchased real estate, giving her own notes for the payment of the purchase price, and taking the conveyance in the names of her children. She having since died insolvent, the question is, whether the land is subject to the vendor's lien. *

ANSWERS.

6. [11 Cent. L. J. 37.] The record of the conveyance from A to B, is not notice to D. Corbin v. Sullivan, 47 Ind. 356. C. CAMBERN.

Rushville, Ind.

6. [11 Cent. L. J. 37.] The rule is that a purchaser of real estate occupies the position of an innocent purchaser, and will be protected, unless he has actual or constructive notice of a prior conveyance, or, in case of an unrecorded deed, he is in possession of facts that would put a reasonably prudent man upon inquiry, when such inquiry would discover such deed or conveyance. In the case stated by "T S R" D had no actual notice of the conveyance from A to B, nor from B to C; nor was he in possession of facts that would, upon inquiry, have discovered such conveyances. Then if he was chargeable with notice at all it would be constructive notice of the conveyance from B to C. But he would not be chargeable with constructive notice thereof, because B was a stranger to the title, his deed would not be in the regular chain of title. Manley v. Pettee, 28 Ill. 128; Wade on Notice, § 214; Irish v. Sharp, 89 Ill. 261; Faircloth v. Jordon, 18 Ga. 350; Calder v. Chapman, 52 Pa. St. 359; Farmer's Loan and Trust Co. v. Maltby, 8 Paige, 361; Dexter v. Harris, 2 Mason, 531. Duchess of Kingston's Case, 2 Smith's L. C. (7th Am. Ed.) 705.

Lincoln, Ill. S. J. WOLAND.

CURRENT TOPICS.

The question of the right of a committee of an insane person to sue in his name for a divorce for the adultery of the other party to the marriage, was recently determined in the affirmative in Baker v. Baker, 28 W. R. 630, by the English Divorce Court. This question was considered to be left unsettled by the decision in the celebrated case of Mordaunt v. Mordaunt, L. R. 2 Sc. & D. 374, where it was held that a lunatic might be made defendant in divorce proceedings. Hannen, P., said: "No one can feel more strongly than I do the difficulty of administering the law of divorce when one of the parties is insane. One of the peculiarities of that law is that the public is deemed to be interested in the disclosure of the relations of the litigants to one another, and of the conduct of the complaining party. This was so strongly felt that, since the first act did not arm the court with sufficient power to investigate the petitioner's antecedents, a public officer was authorized to intervene in the proceedings. To allow the suit to proceed against an insane person is an abandonment of the most obvious and in most cases the only means of obtaining information which the legislature considered the public welfare to require; and with regard to the interests of a respondent, although the proceedings are not criminal, yet the same principles of justice and humanity which introduced into the criminal law the provision that no insane person can be called upon to answer a charge of having committed a crime when sane, seem equally applicable to proceedings, especially against a woman, for dissolution of marriage on account of adultery. * * * It is said that the right to sue for a divorce is personal and can only be exercised by the individual who has been wronged. If sane, the petitioner could condone his wife's offense. He might be conscious of having committed matrimonial offenses which would debar him from a divorce, and his conscience might therefore prevent his asking for it. All these arguments are equally applicable to a suit for a judicial separation which, it is conceded, may be maintained on behalf of a lunatic. It has, however, been urged that in those cases the lunatic, if he recovered his senses, might forgive his wife and take her back, whereas in a suit for dissolution the mischief, if he should regard it as such, would be irreparable, for the divorced wife might have married some one else, but this argument is one which should rather have been addressed to the discretion of the Lords Justices, without whose consent these proceedings can not be taken, than urged upon this occasion, for it is to be observed that proceedings for a judicial separation would be productive, in some cases, of as great personal hardship to a lunatic as the disssolution of his marriage. Although insane on some subjects he might be capable of deriving comfort and advantage from the society of his wife, and might be willing to overlook her frailty in consideration of her kindness to himself or his children. I should add that the possibility of a husband forgiving his wife's adultery is not to be regarded as remote; for it is a fact of every day occurrence, as the records of this court abundantly show. On the other hand, it can not be denied that if reasons of expediency are to be considered, great wrong might arise from my holding that no proceedings for a divorce can be maintained against the adulterous wife of a lunatic. She might be left in possession of property settled upon her by her husband, which she and her paramour might enjoy to the exclusion of the lunatic; she might exercise a power of appointment in favor of the paramour or of the offspring of his and her adultery, by which the devolution of estates or titles might be altered in favor of illegitimate objects. Those evils could be averted only by a dissolution of the marriage. The consideration which has most pressed upon me in the support of the respondent's contention is this: It is well known that it is a part of the religious faith of all Roman Catholics and of many members of the Church of England, that the bond of marriage is indissoluble. This belief has been recognized in the statute under the authority of which divorces are granted, and no clergyman can be compelled to solemnize the marriage of a person who has been divorced on account of adultery. It is certainly startling that if a person who believes in his conscience that the dissolution of a marriage is unlawful in the sight of God should have the misfortune to become insane, the committee of his estate might be authorized, on account of some question of money, to obtain a decree dissolving the marriage. I do not feel that this consideration is disposed of by the fact that the Lord Justices have a discretion in the matter, for how can they, or any other human tribunal, determine what might be the conscientious conviction of any person on such a subject? But this and all other considerations appear to me to have been overpowered by the decision of the House of Lords, which amounts to this: that since proceedings for divorce are civil, recourse must, in cases where lunatics are litigants, be had to the ordinary forms of civil courts, although no provision for the case of a lunatic is contained in the Divorce Act. I can see no distinction between lunatic petitioners and lunatic respondents, and therefore I think that the judgment of the House of Lords in Mordaunt v. Mordaunt is by necessary implication binding upon me in the present case. I must, therefore, hold that the insanity of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage."

In *Hazelton v. Week*, recently decided by the Supreme Court of Wisconsin, it was ruled that where a trespasser enters upon the land of another, and severs timber therefrom which he sells to a third party, and the buyer goes upon the land to remove it, the latter is liable in trespass, even though he was ignorant of the facts and had no intention of committieg a trespass. Said Cole, J., "As soon as the timber was out it became the personal property of the owner of the land, and Week, in going upon the premises, and removing the logs without authority from such owner, was a trespasser, and liable in damages for the wrong. It is not essential to that responsibility that the element of a wilful or intentional trespass should enter into the transaction; it was sufficient that he was taking away property which he had no right to remove. If he did not know who owned the land, he was bound to know that the logs severed from the soil were the property of the owner, whoever he might be, and that without the consent of such owner, he had no right to interfere with the property. This rule of law is well settled in this court." So in Dexter v. Cole, 6 Wis. 317, which was an action of trespass, it appeared that the defendant, who was a butcher in Milwaukee, was driving some sheep he had purchased towards the city, upon the highway, when they became mixed with a small lot belonging to the plaintiff, which were running at large upon the highway. The defendant drove the whole flock into a yard near the road, for the purpose of parting them, and did throw out a number which he did not claim, and pursued his way with the remainder to his slaugh-

ter-house, where they were slaughtered in his business. The evidence tended to show, and the jury found it did show, that some four of the plaintiff's sheep remained in the flock, and were driven to Milwaukee and slaughtered. The court maintained the action on the ground that any unlawful interference with, or acts of ownership over, property, to the exclusion of the owner, were sufficient to sustain the action, and that it was not necessary to show actual or forcible dispossession of property; that the intent did not necessarily enter into the trespass; that it was sufficient if the act done was without a justifiable cause or purpose. The case nearest in point to the one at bar is Higginson v. York, 5 Mass. 341. The head note thus states the case: "A having entered the close of B, and having cut a quantity of cord-wood, sells the same to C, who hires D, the master of a coasting vessel, to go in company with C and transport the wood to market. D was held liable for the value of the wood in an action of trespass *quare clausum fregit*, brought by B, although it was agreed he was ignorant of the original trespass committed by A." In Hobart v. Haggert, 12 Me. 167, which was an action of trespass for taking an ox belonging to the plaintiff, it was proved that the defendant met the plaintiff in the street, and bought of the latter an ox, which the plaintiff directed him to go and take out of his enclosure, and the defendant, by mistake, took the wrong ox. The defendant was held liable in the action. The court say: "The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit trespass in so doing. Neither does the officer when, on a precept against A, he takes, by mistake, the property of B, intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division, cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers." Cooley on Torts, 348.

Mr. Freeman, the reporter of the Supreme Court of Illinois, has just made an announcement which will be heartily received by the profession in that State. For several years past he has been importuned to furnish the lawyers of Illinois with advance sheets of the official reports, but this has always been an impossibility. At last, however, through the operation of the appellate court system which has so materially lessened the business in the Supreme Court, the reporter is enabled to make the following offer, viz.: To furnish to subscribers to the Illinois Reports, advance sheets of the cases in each volume, commencing with volume 95 (which will begin with the cases in which opinions have been filed in the months of May and June,) at the price of $1 per vol. in addition to the present price of the book ($2.25). This is simply the cash cost of the sheets to the reporter, such cost comprising the paper, press work, folding and stitching and postage—but not the type-setting or stereotyping, that expense being charged upon the book itself. These advance sheets will embrace the cases in each current volume, without the index. "In order that the profession may be fully advised of the advantages or lack of advantages, in this plan," says the reporter in his announcement, "I wish to suggest that it will sometimes happen that there will not be enough matter to complete a volume until another term of court shall have furnished more opinions—as will be the case with vol. 95—there are not cases enough now to finish that volume, and will not be until the court meet again in conference at the September term. But the general effect of my being up with the work of the office, so as to be able to furnish the advance sheets in the way I propose, will be to facilitate the issuing of the volumes themselves. Within thirty days after issuing the advance sheets which will finish any given volume, I expect to have the volume itself ready for delivery. While I do not expect to derive any profit from the advance sheets, the scheme may supply a want of the profession in furnishing at an early day the information they so much desire.." We hope the Illinois bar will recognize the fact that this scheme completes a means of obtaining the decisions of the Supreme Court quite unequalled in the history of law reporting. Under our arrangements with the reporter, subscribers to the CENTRAL LAW JOURNAL ILLINOIS ADDENDUM can obtain the official *syllabi* of all opinions in the Supreme Court within a few days after their filing. These will last them until the advance sheets of the reports come from Mr. Freeman. The subscribers to the CENTRAL LAW JOURNAL and the Illinois Reports are surely to be envied.

RECENT LEGAL LITERATURE.

LIEBER'S HERMENEUTICS.

This work has been out of print for nearly forty years, yet its teachings have left their manifest impress upon our American jurisprudence. So much attention is being given of late years to the investigation of all fundamental principles in the science of the law, that the new edition of Dr. Lieber's treatise, under the editorship of Professor Hammond, will at once find a place both in libraries, and on desks and study-tables.

The author gives an extended and sufficiently full discussion of the rules that rationally and logically should govern in all cases of the interpretation and construction of language, the application being frequently general, yet always with special reference to legal and political questions. The distinctive feature of Dr. Lieber's system is the principle that any and all language by whomsoever used, and under whatsoever circumstanees, may become the subject of interpretation, because all language, even the clearest and most specific, is but the use of signs, which are always inadequate to the most complete and exact representation of human thoughts or ideas. Thus it is not ambiguity which calls in the first instance for interpretation, or rather, it is not any particular ambiguity, for all spoken or written language is necessarily ambiguous to some extent, as the author demonstrates; and interpretation to some extent is always necessary. To know how, then, to interpret language fairly, correctly and thoroughly, must always engage the attention of the honest student, no less than the philosopher. For convenience, Dr. Lieber uses the term "Utterer" to describe the person who employs the language to be considered, whether he be the party to a contract, the grantor in a deed, the testator in a will, the legisla-

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Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with remarks on precedents and authorities. By Francis Lieber, LL.D., author of "Manual of Political Ethics," Third edition, with the author's last corrections and additions, and notes, by William G. Hammond, Professor of Law in Iowa State University. St. Louis: F. H. Thomas & Co. 1880.

ture in a statute, or the people in a written Constitution. In Interpretation, we search for and discover the exact thought or idea of the Utterer in the language he has employed. In Construction, we take into account attendant circumstances, the environments of the Utterer, and language or utterances *in pari materia*, and by the aid of these additional materials, we construct or build up a new mental edifice, the idea or thought contained in or expressed by which, we say is the idea or thought which we impute to the Utterer by reason of the language which he used; whether that was, subjectively to himself, his precise idea or not. This expresses briefly, in our own language, the distinction taken by the author between Interpretation and Construction. There is always ambiguity existent whenever Interpretation only is called for; but when the necessity arises for going outside of the language and using extraneous matters in order to ascertain the true thought, then the process becomes Construction. The mental operations, the means employed, the rules by which we are to be guided, the safe-guards to be used, and the manner of testing the results, are laid down with perspicuity in both these classes of cases. Dr. Lieber's extended discussion of the whole subject should be carefully studied by all legislators and lawyers, as well as by all executive officers of high rank; for his suggestions are calculated to instruct and benefit all who are called upon either to make or expound the laws, or to give general directions for their execution. Of especial value to those who make laws, could their careful and candid attention be enlisted, would be found the suggestion of Dr. Lieber that extended explanations and industrious amplification of language in statutes, can never have the desired effect of greater and greater clearness, but can only result in greater and greater obscurity. This is but a logical deduction from the fundamental doctrine that all language is imperfect as an expression of ideas, so that interpretation is always necessary. The fewer and plainer the words, therefore, which are employed to express the idea, the easier and simpler will be the process of interpretation, a process which can not be avoided by the multiplication of words or phrases.

To the admirable text of the author, Professor Hammond has appended occasional valuable foot notes. But he has also extended the text by the addition of several admirable supplementary notes on special subjects discussed by the author, in which the views of other writers and jurists are carefully collated with those advanced in the text; thus supplementing most usefully the original work, without marring its symmetry. The notes of the editor on Written and Unwritten Constitutions, and on Precedent and Authority in the Law, may be mentioned as especially valuable.

THE AMERICAN REPORTS.

The thirtieth volume of this series embraces cases from seventeen States and contains in all over 900 pages. Among the cases of general interest not hitherto noted in our columns we observe the following: Although one convicted of assault with intent to kill can not be sentenced to imprisonment in the penitentiary at hard labor, such sentence is only voidable and not void and relief can only be obtained by appeal, not by *habeas corpus*. *Ex parte Bond*, 9 S. C. 80. One who secretes himself in a dwelling house at night with intent to commit a felony therein, and being discovered escapes by unlocking a door, is not guilty of burglary. *Adkinson v. State*, 5 Baxt. 569. The public have only an easement in the highway to pass and repass along it. Therefore, where one stops in the road and uses loud and obscene language, he becomes a trespasser, and the owner of the land has the right to abate the nuisance which he is creating. *State v. Davis*, 80 N. C. 351. Two years in the county jail is not a cruel and unusual punishment in the case of one who has beaten his wife. *State v. Pettie*, 80 N. C. 367. A person who carries on the business of buying timber and converting it into lumber for sale is not a "trader" nor subject to be taxed as such. *State v. Chadbourn*, 80 N. C. 479. A note given on the completion and settlement of an illegal business, by one of the partners therein to the other, for profits thereof, is valid and enforceable. *De Leon v. Trevino*, 49 Tex. 88. A suit for *mandamus* for an office will not be determined after the term of the office has expired. *Lacoste v. Duffy*, 49 Tex. 767. Cracking and eating nuts during a religious service will constitute a "disturbance of religious worship." *Hunt v. State*, 2 Tex. App. 116. A banker suspecting S of an intention of robbing his bank, employed detectives to act as decoys and induce him to enter the bank with intent to rob it: *Held*, that he could not be convicted of burglary. *Sperden v. State*, 3 Tex. App. 156. A statute imposing a penalty on railway conductors for failing to cause their trains to stop five minutes at every way station is constitutional. *Davidson v. State*, 4 Tex. App. 545. One who sells his goods at public auction is an "auctioneer," and liable as such for a license fee. *City of Goshen v. Kern*, 63 Ind. 468. Playing "policy" is within the statute against lotteries. *Wilkinson v. Gill*, 74 N. Y. 63. A common carrier received a package for transportation agreeing to carry it for a stipulated sum prepaid without inquiry as to its value or notice of a limited liability on account of value, and without misrepresentation or artifice on the part of the shipper. Discovering that the package was of greater value than he had supposed, he refused to deliver it to the consignee without additional compensation which the consignee paid. *Held*, that the latter might maintain an action to recover it back. *Baldwin v. Liverpool etc. Steamship Co.*, 74 N. Y. 125. An attorney has no right to release his client's judgment without his knowledge or consent. *Kirk's Appeal*, 87 Pa. St. 243. A sealed agreement for a valuable consideration not to make a will to the prejudice of the rights of the covenanter's heirs in his estate is valid. *Taylor v. Mitchell*, 87 Pa. St. 518. A statute limiting the right of admission as attorney at law to white male citizens is not in conflict with the Federal Constitution. *Re Taylor*, 48 Md. 28. Property exempt from execution is not susceptible of fraudulent alienation. *Derby v. Weyrich*, 8 Neb. 174.

The American Reports, containing all Decisions of General Interest decided in the courts of last resort of the several States, with Notes and References. By Irving Browne. Vol. 30. Albany: John D. Parsons, Jr. 1880.

THE STUDENT'S SERIES.

The last two volumes issued of this series of law primers are Judge Cooley's Principles of Constitu-

The General Principles of Constitutional Law in the United States of America. By Thomas M. Cooley, LL.D., author of Constitutional Limitation, etc. Boston: Little, Brown & Co. 1880.

tional Law and Mr. Heard's Principles of Pleading in Civil Actions. The former work will be a useful hand-book to the older lawyer as well as to the younger student. Its design being to present within the limits of a hand-book the general principles of Constitutional law pertaining both to the Federal and State systems, and the writer being no less a person than the author of the most widely read work on the subject at the present day, it may fairly be said to invite as it will be certain to receive,much greater attention than books of this character can ordinarily share. It contains, inclusive of the index, 375 pages. The Constitution of the United States prefaces the first chapter in full; this is well, as it is the text of the discourse which follows, the author's plan being to consider each section of the Constitution and its amendments in their order. The work might, therefore, have been better entitled a Manual of the Constitution of the United States. We can not refrain from congratulating the student who finds at his entry into the study of the constitutional law of our country, so graphic, yet simple, full, yet succinct, a presentation of the subject.

The science of special pleading has in nearly all the States given place to the codes. Its technicalities, or as the old lawyers delighted to call them, its "niceties" were legion. While it was always claimed that its end was a good one, viz., to arrive at a *single* issue which could be determined by a jury, the way was so tedious, and the manner of travel so dangerous, that few fuitors sorrowed at its downfall. Now, according to Mr. Pomeroy, to construct a perfect pleading according to the ideal of the code, requires but three things — an accurate knowledge of the legal rights of the parties, a familiarity with the facts of the case, and the ability of composing a clear narrative of the material facts. Doubtless, therefore, to a great majority of law students the works of Professor Pomeroy, or Judge Bliss will be more attractive than that well known work on common law pleadings, Stephen on Pleading, from which Mr. Heard seems to have drawn so considerably in the preparation of the work before us, that more than a cursory examination is necessary to convince one that it is not the English book revised for the American market.

NOTES.

——In a late case in one of the Federal Courts of New Jersey, (*Goble v. Delaware, etc. R. Co.*, N. J. L. J. 176), the late English case of Phillip v. London, etc. R. Co., 9 Cent. L. J. 125, was followed as to the elements of damage which a jury should take into consideration in actions for personal injuries. They are: 1. The bodily injury sustained. 2. The pain undergone. 3. The effect on the health of the sufferer according to its degree and its probable duration, as likely to be temporary or permanent. 4. The expense incidental to attempts to cure or to lessen the amount of injury. 5. The pecuniary loss sustained through inability to attend to a profession or business, which again may be of a temporary character or may be such as to incapacitate the party for the remainder of his life.

——Judge McCrary is now a Doctor of Laws, this degree having been conferred upon him by the College of Iowa at its last commencement.——Chief Justice Curtis of the Supreme Court of New York died last week.——There are now about 1,900 prisoners of the United States confined in the various prisons of the country. The prisons at Albany and Detroit have something more than 300 each, and the one at Allegheny has 200. Latterly the expense of maintaining prisoners has been greatly reduced, and it soon promises to disappear entirely. The Albany and Detroit prisons make no charge for maintenance, finding it profitable to secure the labor of the prisoners in return for board and clothing, the cost of which is estimated at about thirteen cents a day. The authorities of the Auburn prison are applicants for Government prisoners on equally favorable terms. Baltimore also wants some of them, but wants eighteen cents a day for keeping them. Every prisoner is visited periodically by an agent of the Attorney-General, and taken into a private room alone, where he has an opportunity to make any complaints he wishes with regard to his treatment.

——An action for assault and battery decided last month in the Supreme Civil Court at Boston, involved a question of some moment as to the right of railroad passengers. The material point of the case was to determine whether a corporation, having agreed to carry a passenger over a through route at a reduced rate, less than that asked for transport to some intermediate station, has a right to prevent the passenger from stopping at that station until he has paid additional fare. The decision of the court holds that the company has no such right. The plaintiff bought an ordinary limited ticket over the Old Colony line, from Boston to New York, for one dollar. Arriving at Newport, to which place the regular fare is $1.60, he started to go ashore, when he was stopped by an officer of the company and not allowed to leave the boat until he had paid the sixty cents difference in fare. He acceded to the demand, and then brought the above action. According to the decision, it seems that a railroad or steamboat company can not lawfully prevent a passenger from leaving the cars or boat at any station when a regular stop is made for the exchange of passengers. The company may demand the difference in fare between local and the through rate, and, if payment is refused, recover the same in a civil action, but have no other remedy.

——Daughters, as well as sons, are bound under the English law to support their parents. There would appear to be some popular doubt about it, and the Stratford-on-Avon Guardians have resolved to try the question. One Miller and his wife are at present in receipt of outdoor relief. They have two daughters in Birmingham, who were asked to assist their parents, but they declined, averring that there was no law to compel them. The guardians think differently, pointing out that the act says the "children" of pauper parents can be compelled to support them, and that the word "children" presumably includes daughters as well as sons.——The *Law Times* says that recent expressions of judicial opinion tend to show that there is a growing feeling on the bench against the present system of trial by jury. Sir George Jessell considers it absurd to expect twelve men to be unanimous about anything. Mr. Justice Bowen also has, during the present Middlesex Sittings, successfully urged trial by judge upon parties in the presence of the jury as a better and higher tribunal under certain conditions, particularly where questions of law are involved, because a judgment may be reviewed directly by the Court of Appeal, whereas a new trial involves an expensive and tedious application to a divisional court. It predicts that trial by jury will decline with the growth in years of the present judicial system.

The Principles of Pleading in Civil Actions. By Franklin Fiske Heard. Boston: Little, Brown & Co. 1880.